

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

SEP 4 - 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of)
)
Implementation of the)
Telecommunications Act of 1996:)
)
Telemessaging, Electronic Publishing,)
and Alarm Monitoring Services)

CC Docket No. 96-152

DOCKET FILE COPY ORIGINAL

Comments of the Yellow Pages Publishers Association

Albert Halprin
Joel Bernstein
Randall Cook
Attorneys for the Yellow Pages
Publishers Association
Halprin, Temple, Goodman and Sugrue
1100 New York Ave., N.W., Suite 650E
Washington, DC 20005
(202)371-9100

September 4, 1996

No. of Copies rec'd
DATE

0211

Table of Contents

	<u>Page</u>
Comments of the Yellow Pages Publishers Association	1
I. Introduction	1
II. Definition of Electronic Publishing	2
III. Structural Separation	3
IV. Sharing of Property	4
V. Relationship of Section 272 and Section 274	5
VI. Joint Marketing	6
VII. Non-Discrimination	9
VIII. Enforcement Issues	10
IX. Conclusion	11

Executive Summary of the Comments of the Yellow Pages Publishers Association

The Yellow Pages Publishers Association ("YPPA") believes that while the Commission may need to clarify certain items in section 274 (such as the meaning of teaming and business arrangements), there is no need to impose any additional rules or regulations on the provision of electronic publishing. Specifically, Congress did not intend the phrase "operated independently" as an invitation to impose additional regulations. Operate independently is descriptive of the other requirements in the section. The term "operate independently" in section 274(b) and the requirement in paragraph 274(b)(3) to carry out transactions in accordance with that independence simply means compliance with all the requirements of paragraphs 274(b)(1) through (9).

The Commission asks about the definition of electronic publishing. Section 274 covers both interLATA and intraLATA electronic publishing. Electronic publishing consists of a Bell operating company (BOC) or affiliate owning or controlling information transmitted over its own basic local exchange telephone service. Both elements must be present -- ownership or control and transmission over its own facilities.

Regarding the sharing of property, a BOC electronic publishing affiliate should be able to lease or rent space from the telephone company, and the telephone company from the electronic publishing affiliate. There is no statutory authority for preventing such arrangements.

Additionally, Congress should not impose the requirements of section 272 on electronic publishing activities. If a BOC provide electronic publishing within the same affiliate as it provides section 272 activities, the affiliate must meet the structural separation

requirements of both section 272 and section 274, but the transaction requirements of those sections can only be applied on a service-by-service basis.

YPPA notes that the restrictions contained in section 274(c)(1) and (2) fall only on the BOC, and not the separated affiliate. The BOC is not permitted to joint market the affiliate's electronic publishing services, but the separated affiliate is permitted to joint market BOC services. Additionally, there are several BOC joint marketing activities which are expressly permitted, including in-bound telemarketing and teaming or business arrangements.

Regarding imposition of additional safeguards under section 274(d), such as those included in Computer III or ONA, Congress determined that the appropriate safeguards are those contained in section 274. There is no need for additional rules and regulations to implement this section.

Finally, the Commission raises several enforcement issues. There is no statutory authority, legal, or policy reason for shifting the burden of proof. Shifting the burden to the defendant would open the floodgates of litigation. Congress did not intend to clog the Commission and the courts with frivolous lawsuits.

The Commission should not regulate electronic publishing with a heavy hand. Section 274's requirements are clear. Congress imposed this regime, and determined that the rules contained in section 274 will protect consumers and allow for fair and meaningful competition in the delivery of electronic publishing services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of)	
)	
Implementation of the)	CC Docket No. 96-152
Telecommunications Act of 1996:)	
)	
Telemessaging, Electronic Publishing,)	
and Alarm Monitoring Services)	
To: The Commission		

Comments of the Yellow Pages Publishers Association

I. Introduction

The Yellow Pages Publishers Association ("YPPA"), by its attorneys, hereby submits Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. YPPA is the largest trade association in the Yellow Pages industry, with more than 400 members. Its membership, which represents 90 percent of all Yellow Pages directories published in North America, generates 98 percent of all Yellow Pages advertising revenues. In addition, many of YPPA's members are affiliated with local telephone exchange providers. YPPA is submitting comments in this proceeding on the Commission's implementation of the electronic publishing provisions under the Telecommunications Act of 1996 because many of YPPA's members currently, or may in the future, provide electronic publishing services and will be affected by the rules for electronic publishing.

YPPA notes that Congress did not require the Commission to initiate a rulemaking to implement section 274. Indeed, section 274 is one of the most extensive and painstakingly

detailed provisions of the entire Telecommunications Act of 1996. While the Commission does recognize, in some places, that Congress made clear its intent,^{1/} YPPA believes that Congressional intent is clear throughout the section. Indeed, the Commission may need to clarify certain items (such as the meaning of teaming and business arrangements), but there is no need to impose any additional rules or regulations on the provision of electronic publishing.

II. Definition of Electronic Publishing

In paragraph 29, the Commission asks whether section 274 covers both interLATA and intraLATA electronic publishing. YPPA believes that section 274 covers both interLATA^{2/} and intraLATA electronic publishing. Although the Commission recognizes that interLATA, but not intraLATA, information services are subject to the separate affiliate requirements of section 272, no such distinction is made with electronic publishing. If Congress had intended to distinguish between inter and intraLATA electronic publishing, it could have done so as it did in section 272 for inter and intraLATA information services.

The Commission also asks which services should be classified as electronic publishing. While these comments will not address any specific company's services, YPPA notes that Congress intended that electronic publishing consist of a Bell operating company

^{1/} See NPRM, paragraph 43, regarding section 274(b)(6). The Commission notes "Because this provision appears to be quite precise, we tentatively conclude that the adoption of regulations to implement this provision is unnecessary."

^{2/} While the scope of these regulations may not depend on a distinction between inter and intraLATA electronic publishing, no service can be classified as interLATA unless the service involves an interLATA telecommunications component provided directly by the BOC over its own facilities.

(BOC) or affiliate owning or controlling information transmitted over its own basic local exchange telephone service. Both elements must be present -- control or ownership of the information and transmission over its own basic local exchange facilities, in order for the electronic publishing service to fall under section 274.

III. Structural Separation

The Commission asks, in paragraph 35, about the meaning of the term "operated independently." As YPPA has stated in its comments and reply comments in CC Docket 96-149^{3/} and in its comments in CC Docket 96-150^{4/}, Congress did not intend the phrase "operated independently" as an invitation to impose additional regulations.

The term "operated independently" appears in the preamble portion of section 274 and is descriptive of the substantive requirements contained in sections 274(b)(1) through (9). Each requirement in sections 274(b)(1) through (9) is there to ensure operational independence. There is no statutory authority or possible statutory construction that would permit the Commission to impose additional requirements in the name of operational independence.

The Commission's own use of the term "operate independently" has been descriptive as well, rather than an excuse to impose additional requirements. In 47 C.F.R. § 64.702(c)(2), the term "operate independently" is a description of the enumerated

^{3/} Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended.

^{4/} Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996.

separation requirements that follow in the rule, not a separate basis for imposing additional requirements. Similarly, the separation rules for BOC cellular affiliates state that the affiliate "must operate independently in the provision of cellular service," and lists four criteria for satisfying this general guideline: (1) separate books; (2) separate officers; (3) separate operating, marketing, installation and maintenance personnel; and (4) separate computer and transmission facilities.^{5/}

Given the apparent Congressional intent not to attach additional requirements to the term "operate independently" and the Commission's use of the term itself, the Commission should conclude that the term "operate independently" in section 274(b) and the requirement in paragraph 274(b)(3) to carry out transactions in accordance with that independence simply means compliance with all the requirements of paragraphs 274(b)(1) through (9).

IV. Sharing of Property

The Commission, in paragraph 42 asks whether a separated affiliate may lease space from or share space with the BOC and *vice versa*. The Commission should not overreach when interpreting the statute. Congress did not prohibit the shared use of property. Moreover, Congress declined to apply any equal treatment rules to electronic publishing, lending strength to the argument that such arrangements are permissible. So long as the transaction is properly accounted for, a BOC electronic publishing affiliate should be able to lease or rent space from the telephone company, and the telephone company from the electronic publishing affiliate. To ensure ratepayers are not subsidizing electronic publishing,

^{5/} 47 C.F.R. § 22.903(b) (1995).

the lease should be valued under the valuation rules the Commission adopts in the accounting safeguard rules. The Commission must be careful not to go beyond the plain language of the statute.

V. Relationship of Section 272 and Section 274

In paragraphs 47 and 48, the Commission explores the relationship between services provided under section 272 and services provided under section 274. Clearly, if a BOC affiliate offers electronic publishing within the same affiliate as it offers interLATA telecommunication services, interLATA information services, or manufacturing subject to section 272 separate affiliate requirements, the affiliate must meet the structural separation requirements of both sections 272 and 274.^{6/} Other requirements of sections 272 and 274 (such as the affiliate transaction requirements), however, cannot meaningfully be applied on an entity-wide basis and need to be applied on a service-by-service basis.^{7/} As an example, should a BOC decide to offer interLATA telecommunications services and electronic publishing through the same affiliate, the affiliate would have to meet the structural separation requirements of both section 272(b) and section 274(b). Yet, when providing

^{6/} YPPA's comments and reply comments in CC Docket 96-149 are also relevant here, to the extent the same issues are raised. For instance, YPPA argues that section 272(b)(3) does not prohibit the sharing of certain in-house functions. While the Commission did not raise the issue in CC Docket 96-152, YPPA's comments apply with equal force here, should the Commission decide to limit or prohibit the sharing of certain in-house functions.

^{7/} Section 272 imposes requirements on certain activities of the BOCs, which do not include electronic publishing activities. Conference Report at 150. Those rules which can be applied on an activity-by-activity or service-by-service basis should be so applied. Structural safeguards, however, cannot possibly be applied on an service-by-service basis if there is only one separate affiliate providing multiple services.

interLATA telecommunications services, the affiliate would be required to follow the affiliate transaction requirements of section 272(b)(5), but when providing electronic publishing, the affiliate would be required to follow the affiliate transaction requirements of section 274(b)(3).

VI. Joint Marketing

In paragraph 53, the Commission tentatively concludes that section 274(c)(1) prohibits the "advertising the availability of local exchange or other BOC services together with the BOC's electronic publishing services, making those services available from a single source and providing bundling discounts for the purchase of both electronic publishing and local exchange services." YPPA notes that the restrictions contained in section 274(c)(1) and (2) fall only on the BOC, and not the separated affiliate. The BOC is not permitted to joint market the affiliate's electronic publishing services, but the separated affiliate is permitted to joint market BOC services.

One goal of the Telecommunications Act of 1996 was to permit customers one-stop shopping for all their telecommunications needs. It is easier for the consumer to deal with one vendor for telecommunications services, rather than multiple vendors. That is the reason why the separated affiliate is permitted to joint market BOC telephone services with its electronic publishing services.^{8/} The BOC separated affiliate is permitted to advertise BOC services, perform joint sales activities on behalf of itself and the BOC, and resell and

^{8/} YPPA notes that Congress did place some conditions on BOC affiliate joint marketing under section 272(g)(1), but declined to place similar restrictions on section 274 separated affiliates.

package BOC services, so long as the joint marketing is performed by the separated affiliate and not the BOC. Indeed, the separated affiliate's joint marketing of BOC services will benefit the ratepayer by helping to efficiently sell more BOC services without increased expenses to the BOC itself, thereby assisting in maintaining affordable residential local telephone service.

Additionally, there are several BOC joint marketing activities which are expressly permitted. One such activity is "in-bound telemarketing" permitted by section 274(2)(A). The Commission asks in paragraph 55, whether it should follow the House Report language regarding inbound telemarketing. The House Report states "[t]hus, a BOC may refer a customer who seeks information on an electronic publishing service to its affiliate, but must make sure that the referral service is available to unaffiliated providers."^{9/} The Commission should follow Congressional intent, as evidenced by the House Report.

By way of example, a customer calling its local BOC about a telephone problem may discuss electronic publishing services with a BOC employee. The BOC employee would then be able to give the customer the names and numbers of electronic publishing services available in that area. In order to be listed, the electronic publishing service must notify the telephone company. The BOC can impose non-discriminatory terms on the provision of referral services, ensuring that its affiliate is treated the same as any other electronic publisher taking advantage of the telephone company's referral service.

^{2/} H.R. Rep. 104-204, part 1, 104th Cong., 1st Sess., House Commerce Committee Report to Accompany H.R. 1555 (1995) at 86.

Additionally, the affiliate could engage the BOC to operate an inbound 1-800 number for it. The affiliate would set up the toll-free number, take out advertising, and pay for the BOC to operate the phone bank. The BOC must, however, make similar services available to non-affiliated electronic publishers on non-discriminatory terms.

Section 274(c)(2) permits the BOC to engage in non-discriminatory teaming or business arrangements with the separated affiliate under certain conditions. In paragraph 56, the Commission asks for a definition of "teaming or business arrangements." Teaming arrangements were a permitted activity under the MFJ.^{10/} Given the practice of permitting a BOC to enter into teaming arrangements as long as the BOC did not directly engage in an impermissible activity itself, a useful definition of teaming arrangement in the context of this rulemaking would be:

an arrangement in which two businesses act independently to provide related products or services, but coordinate their activities so that the customer obtains a "complete" package of the desired products or services. Teaming may include joint sales activities (including joint planning for sales calls), through advertising, premise visits or telemarketing.

For example, a BOC could team with its separated affiliate, with the BOC providing a customer with regulated telephone service and the separated affiliate providing the same customer with an electronic publishing services, and perhaps interLATA service as well. Or, a BOC and a separated affiliate could coordinate advertising activities, so that the BOC's

^{10/} See, e.g., exchange of letters between Kevin R. Sullivan, Assistant Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, and Victor J. Toth on June 12, 1986 and February 23, 1986; and exchange of letters between Kevin R. Sullivan and Mark D. Hallenbeck, General Attorney, BellSouth Corporation, May 28, 1986; April 29, 1986 regarding teaming arrangements between BellSouth and SouthNet, attached hereto as Exhibit A.

advertisement and the separated affiliate's advertisement appear on the same page of the newspaper.

Teaming arrangements must be non-discriminatory. Teaming arrangements between a BOC and its separated affiliate can not be markedly different than teaming arrangements made available to other electronic publishers. This creates a level playing field, and is the reason why a BOC can engage in certain teaming activities, which otherwise might not be permissible.

VII. Non-Discrimination

In paragraphs 64 through 67, the Commission asks whether additional regulations are necessary to implement the non-discrimination requirements of section 274(d). Additionally, the Commission asks if it should impose Computer III^{11/} and Open Network Architecture^{12/} requirements, to the extent such requirements are not inconsistent with

^{11/} Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), recon., 2 FCC Rcd. 3035 (1987), further recon., 3 FCC Rcd. 1135 (1988), second further recon., 4 FCC Rcd. 5927 (1989); Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd. 3072 (1987), recon., 3 FCC Rcd. 1150 (1988), further recon., 4 FCC Rcd. 5927 (1989); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd. 7719 (1990), recon., 7 FCC Rcd. 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); BOC Safeguards Order, 6 FCC Rcd. 7571 (1991), vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995).

^{12/} See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988), recon. 5 FCC Rcd 3084 (1990), ; 5 FCC Rcd 3103 (1990), erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993); 6 FCC Rcd 7646 (1991); 8 FCC Rcd 2026 (1993), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

section 274(d). The statute requires that network access and interconnection for basic telephone service be just, reasonable, and according to a filed tariff (so long as rates for such services are subject to regulation). The rates charged to affiliated and unaffiliated electronic publishers must, according to section 274(d), be the same. There is no need for additional rules and regulations to implement this section. The language of the statute is clear -- network access and interconnection for basic telephone service is to be available at just and reasonable tariffed rates, and should be the same for all electronic publishers, whether affiliated with the BOC or not.

Once the rates for basic telephone service are no longer subject to regulation, this section is no longer applicable. This section is meant to guarantee that all electronic publishers, whether affiliated with a BOC or not, will be able to obtain the basic telephone services necessary to operate an electronic publishing service, at just and reasonable rates. Once there is local telephone competition (and rates are no longer subject to regulation), electronic publishers will have a choice of local exchange service providers. The marketplace, rather than regulation, will determine the appropriate price for basic local telephone service, with the electronic publisher able to choose among providers.

VIII. Enforcement Issues

The Commission raises several enforcement issues. In paragraph 79, the Commission asks whether there is a policy reason for shifting the burden of proof, once a *prima facie* case has been made.

There is no statutory authority, legal, or policy reason for shifting the burden of proof. The party claiming a violation of this section has the burden of proof to prove a violation has occurred. Shifting the burden to the defendant would open the floodgates of litigation. Complainants would be able to sue with little or no proof of a violation. Congress did not intend to clog the Commission and the courts with frivolous lawsuits. There is no basis upon which the Commission should shift the burden of proof.

The Commission also asks what evidentiary and legal standards should apply. The Commission should follow its current practice in similar complaint cases. The complainant must show by a preponderance of the evidence that a violation of section 274 has occurred.

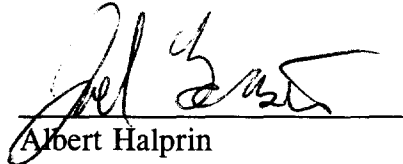
In paragraph 80, the Commission asks about the showing necessary for the Commission to issue a cease and desist order. The Commission should issue cease and desist orders only after the Commission has found a violation has occurred, and no other remedial action can cure the violation. This section is not an invitation for the Commission to issue temporary injunction-like relief. That is for the courts to issue, as the section clearly contemplates the ability of a complainant to seek such relief before a U.S. District Court.

IX. Conclusion

The Commission should not regulate electronic publishing with a heavy hand. Section 274's requirements are clear. Congress imposed this regime, and determined that the rules contained in section 274 will protect consumers and allow for fair and meaningful competition in the delivery of electronic publishing services. In fact, Congress did not require the Commission to engage in a rulemaking to implement section 274. Much of the

Telecommunications Act of 1996 is aimed at elimination of overregulation. The Commission should heed that same message when considering rules implementing section 274.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Albert Halprin', is written over a horizontal line.

Albert Halprin
Joel Bernstein
Randall Cook
Attorneys for the Yellow Pages
Publishers Association
Halprin, Temple, Goodman and Sugrue
1100 New York Ave., N.W., Suite 650E
Washington, DC 20005
(202)371-9100

September 4, 1996